

STATE OF DELAWARE
PUBLIC EMPLOYMENT RELATIONS BOARD

LOCAL 1590, INTERNATIONAL ASSOCIATION :
OF FIREFIGHTERS, :
and :
LODGE NO. 1, FRATERNAL ORDER OF POLICE, :
Petitioners, :
v. : U.L.P. No. 89-09-041
CITY OF WILMINGTON, :
Respondent. :

The City of Wilmington ("City" or "Respondent") is a municipal corporation of the State of Delaware and a public employer within the meaning of section 1601(1) of the Police Officers' and Firefighters' Employment Relations Act, 19 Del.C. Chapter 16 (hereinafter "the Act"). Local 1590, International Association of Firefighters ("Local 1590" or "Petitioner") is the exclusive bargaining representative of the employees employed in the ranks of firefighter, lieutenant, and captain in the fire department of the City of Wilmington, within the meaning of 19 Del.C. section 1604. Lodge No. 1, Fraternal Order of Police ("the FOP" or "Petitioner") is the exclusive bargaining representative of the employees employed in the ranks of police patrolperson, sergeant, lieutenant and matrons in the police department of the City of Wilmington, within the meaning of 19 Del.C. section 1604.

Local 1590 and the FOP filed unfair labor practice charges

against the City of Wilmington on August 23, 1989 and September 13, 1989, respectively. The complaints charge the City with unilaterally modifying terms and conditions of the parties' collective bargaining agreements during the term of those agreements in violation of sections 1607 (a)(5) and (a)(1) of the Act.

By teleconference with the Executive Director of the Public Employment Relations Board on September 19, 1989, the parties agreed to join the charges filed by Local 1590 and the FOP. Further, the City agreed to waive without prejudice or precedent its argument that the issue should be deferred to the Unions' respective contractual grievance procedures. All parties agreed that there was no need for a formal hearing on the underlying facts in this case and stipulated facts and issues were jointly submitted to the PERB on October 24, 1989. Simultaneous briefs were filed by all parties, with the final brief being received on November 13, 1989.

STIPULATED FACTS [1]

The City and the Unions are parties to collective bargaining agreements effective July 1, 1987 through June 30, 1990.

On or about May 12, 1989, the City of Wilmington issued a notice that provisions of various health care benefit plans ("the plans") provided under the contracts would be changed. The plans were changed by imposing deductible amounts and requiring co-insurance payments from members represented by the Unions. This change in benefits was the subject of an unfair labor practice proceeding (U.L.P. No. 89-05-037)

[1] The facts and issue included herein are taken directly from the Stipulated Facts and Issues as jointly submitted by the parties on October 18, 1989.

decided by Executive Director Charles D. Long on June 26, 1989. This decision concluded that the City's unilateral mid-contract change in benefits violated the Act. The FOP had stipulated on June 27, 1989 that it would be bound by this decision as the resolution of its own similar charge (U.L.P. No. 89-06-038).

The City of Wilmington later advised the Union that in order to implement the Executive Director's award, it was necessary to suspend certain "Peripheral" benefits from two non-Blue Cross HMO plans (Principal and St. Francis) because Blue Cross/Blue Shield would not offer insured plans if these benefits existed in other plans and not the Blue Cross plans. Specifically, these benefits were (a) a \$1,000 dental benefit and (b) disability insurance that had been added to the "St. Francis" and "Principal" HMO plans on or about July 1, 1988, as inducements for employees to enroll in these plans. The City unilaterally added these "Peripheral" benefits in July, 1988 without the Unions' objections.

Despite the Unions' requests to the authorized representatives of the City, the "Peripheral" benefits were not restored even though the enrollment period for Blue Cross/Blue Shield has concluded.

Applicable provisions of the Local 1590 contract state:

ARTICLE VIII - HEALTH AND WELFARE

Section 1. All employees within the bargaining unit herein specified shall be covered by one of the benefit packages provided by the City and described in Appendix A, attached hereto. This in no way restricts the City from changing carrier or carriers of the insurance, however, the City agrees to maintain, at a minimum, the exact levels of

coverage item for item, benefit for benefit, for each plan listed in Appendix A, should a decision be made to change carriers.

Article IX of the FOP collective bargaining agreement provides as follows:

Section 1. The City agrees to provide health insurance for employee coverage and family benefits as described in Appendix A, pp. 1 & 2, attached hereto. There shall be no diminution in total benefits, and the substitution of another carrier shall be subject to written sign-off by the Lodge to this effect when the new program is developed. (See attached Exhibit 1).

In a sworn affidavit of economic impact attached to the Stipulated Facts of the Parties, Albert F. Carter, Director of Personnel for the City of Wilmington since July, 1987, stated:

In July, 1988, in conjunction with the annual reenrollment period for health benefits, the City increased the dental benefit for non-Blue Cross plans to a maximum of \$1,000 family coverage, over the contractually negotiated \$500 maximum. Additionally, the City added a long-term disability policy to the non-Blue Cross plans. The long-term disability policy is not a contractually negotiated term or condition. The above increased dental and additional long-term disability insurance were applied to employees City-wide, both Union and non-Union, in the non-Blue Cross plans. There was no objection by the Union to the increased dental coverage or long-term disability insurance.

For fiscal year 1989 (FY'89 began July, 1988), approximately 540

Union City employees elected the non-Blue Cross coverage. The budgeted cost to the City for the increased dental was approximately \$32,000. The actual cost of long-term premiums to the City was approximately \$63,000. Therefore, total costs were approximately \$95,000.

Of the approximate 540 employees covered under the non-Blue Cross plans in FY'89, 106 were police officers and 111 were firefighters. This group of 217 accounted for approximately \$13,00 in budgeted costs for additional dental and approximately \$28,000 for the additional cost of long-term disability premiums.

For fiscal year 1990, approximately 528 employees are covered under the non-Blue Cross plans; of the 528, 102 are police officers and 94 are firefighters. This group of 196 will account for at least \$23,520 in budgeted costs [2] for additional dental and approximately \$25,000 for the additional cost of long term disability premiums.

STIPULATED ISSUES

1. Did the Unions waive their rights to challenge removal of the peripheral benefits by not objecting when the benefits were established by the City on or about July 1, 1988?

2. Does the City violate the Act by unilaterally withdrawing a non-negotiated increase to a negotiated benefit item (i.e., increased dental benefit)?

3. Does the City violate the Act by unilaterally withdrawing a non-negotiated increase to a non-negotiated benefit item (i.e., the addition of long-term disability which is not a contractually

[2] On advice from the City's actuary, based on increased utilization, the City has doubled the budget for dental in FY'90 over that of FY'89.

negotiated benefit item)?

POSITIONS OF THE PARTIES

CITY: The City argues that the Unions have effectively waived their statutory right to object to the withdrawal of the increased dental and additional long term disability insurance because no objection was raised at the time these benefits were unilaterally implemented in July, 1988. In support of its argument, the City cites a number of NLRB cases which, it contends, clearly establish that, in order to preserve its right to bargain, it is incumbent upon the Union(s) to request bargaining in a timely manner once notice has been received of the employer's proposed change in terms and conditions of employment

The City next argues that the status quo in this case is determined by the provisions of the parties' collective bargaining agreements, neither of which include or specifically incorporate the July 1988 benefit enhancements. Further it asserts that it is not clear that these benefit enhancements constitute mandatory subjects of bargaining. The addition of long term disability benefits and the doubling of the maximum family dental benefits are, in the City's words, "relatively insignificant changes". The City urges the PERB to rule on the bargaining status of the modifications in question on the basis of the unique circumstances in this case rather than on the generalized subject of insurance benefits.

The City also maintains that there were valid reasons why it could not continue the "peripherals". The City avers that it was necessary for it to terminate the peripheral benefits in order to comply with the prior PERB order in Local 1590, IAFF v. City of

Wilmington (Del.PERB, U.L.P. No. 89-06-038 (6/26/89) and to satisfy its obligation to provide contractually agreed upon "basic benefits". It argues that the continuation of the peripherals would be expensive and sensitive to inflationary forces. Finally it contends that neither Union nor any individual bargaining unit member has shown any detrimental reliance on the peripheral benefits and that all employees have been given the option to return to the contractually negotiated benefits matrix.

UNIONS: The Unions assert that a waiver of the statutory right to bargain a mandatory subject of bargaining should not be readily inferred. In the alternative, the Petitioners argue that even if the right to bargain over the initial implementation of the benefits was, in fact, waived, it is illogical to contend that the waiver continues indefinitely in time and/or that it negates the duty to bargain when subsequent modifications occur. According to the Unions, a party does not waive its right to bargain a mandatory subject of bargaining merely because the contract is silent on that subject. Once added the enhancements to the non-Blue Cross/Blue Shield health insurance packages became an integral part of the benefit packages.

The FOP further asserts that the contractual language contained in Article XIX [3] of the current collective bargaining agreement negates an inference that the waiver of bargaining rights at the point of unilateral implementation of benefit enhancements constitutes an

[3] Specifically, Article XIX, section 2 provides:
The waiver of any breach or condition of
this Agreement by either party shall not
constitute a precedent in the future enforce-
ment of the terms and conditions herein.

absolute waiver of the right to bargain subsequent modifications.

The Unions argue that it is clear in this jurisdiction that a unilateral change in terms and conditions of employment during the term of an existing collective bargaining agreement by either party is a per se violation of the Act, without exception. The Unions contend that the relevant issue is whether the modification in question relates to a mandatory subject of bargaining, not whether the implemented change affects a negotiated or non-negotiated benefit.

The Unions aver that the benefit enhancements at issue are mandatory subjects of bargaining, as they constitute direct and immediate economic benefits accruing to employees out of their employment relationship. The fact that Blue Cross/Blue Shield insisted that the City remove the peripherals from the non-Blue Cross/Blue Shield packages is evidence that Blue Cross/Blue Shield did not view the peripherals as insignificant benefits.

Finally, the Unions charge that the unilateral withdrawal of the benefit enhancements is a direct attack on the integrity of the collective bargaining process. By implementing a unilateral change in a mandatory subject of bargaining, the City has interfered with employee rights, in violation of section 1607(a)(1) of the Act, regardless of whether or not the subject has been previously negotiated.

OPINION

The Police Officers' and Firefighters' Employment Relations Act (19 Del.C. Chapter 16) grants to public employees the right of

organizaion and representation. It requires public employers and the certified representative of employees to enter into collective bargaining. 19 Del.C. section 1601. An effective waiver of the statutory right to bargain mandatory subjects must be clear and unmistakable and is evidenced by express contractual provisions, by bargaining history, or by a combination of the two. American Distributing Co, Inc. v. NLRB, 9th Cir., 715 F.2d 446 (1983).

The City argues that the Unions are guilty of waiver by inaction because they did not request bargaining in a timely fashion at the time of the insitution of the increased benefits in July, 1988. The City's "waiver by inaction" argument is based upon the invalid premise that the benefits in question were only bargainable at the time of their initial institution, and is, therefore, unpersuasive. The National Labor Relations Board, in ruling on the similar issue of unilateral recission of an employee purchase program, concluded in Owens Corning Fiberglass Corp. (282 NLRB 85, 124 LRRM 1105 (1/5/87)):

...The Board will not lightly infer waivers of statutory rights... Nor does the fact that the Respondent previously changed the terms of the program without bargaining preclude the Union from effectively demanding to bargain over the most recent change. A union's acquiescence in previous unilateral changes does not operate as a waiver of its right to bargain over such changes for all time.

The Ninth Circuit Court, in reviewing the NLRB's decision in Miller Brewing Company (9th Cir., 408 F.2d 12 (1969)), also recognized that the statutory right to bargain is not so easily forfeited:

... it is not true that a right once waived under the

Act [NLRA] is lost forever. [cites omitted]. Each time the bargainable incident occurs - each time new rules are issued - the Union has the election of requesting negotiations or not. An opportunity once rejected does not result in a permanent "close-out"; as in contract law, an offer once declined but then remade can be subsequently accepted.

Once the City unilaterally implemented the benefit enhancements, without Union objection, it effectively modified the insurance packages available to employees. The Unions' failure to object constitutes tacit agreement to the enhancements, but does not serve as a waiver of its right to negotiate future modifications. We find that the implementation of the benefits is a separate incident from the City's rescission of these same benefits at this time.

The NLRB cases cited by the City in support of its position that the Unions waived their right to bargain by not requesting to do so in July 1988 are distinguishable for the reason that the cases deal with the failure of labor organizations to request bargaining, in a timely manner, on subjects or modifications proposed by an employer who subsequently filed charges against the employer when the same proposals were implemented. Whether the Unions made a timely request to bargain the rescission of the peripherals is not in issue in this case, but rather whether the City had a right to unilaterally alter the peripherals at will because the Unions had not objected to the unilateral implementation of the benefit enhancements. It is undisputed in this case that the Unions clearly expressed, in a timely manner, their objections to the rescission of the peripheral benefits and requested the restoration of the benefits.

Having concluded that the Unions did not waive their prospective rights to bargain, we must resolve the question of whether the disputed "peripherals" constitute mandatory subjects of bargaining under the Act. Collective bargaining is defined as the mutual obligation to confer and negotiate in good faith with respect to "... matters concerning or related to wages, salaries, hours, grievance procedures and working conditions..." 19 Del.C. section 1602(e) and (p). The PERB has defined the scope of mandatory subjects of bargaining through many of its prior cases. In Appoquinimink Education Association v. Board of Education [4] (Del.PRB, U.L.P. No. 1-3-84-3-2A (8/14/84)), the Board began its analysis of the statutory provisions:

... [T]he phrase '...matters concerning or related to...' constitutes a broad and encompassing scope of negotiability. It is clear that the legislature intended all matters concerning or related to the specific terms and conditions of employment to be mandatorily bargainable unless statutorily reserved to the exclusive prerogative of the public...employer. (p.11)

Section 1605 reserves to the employer the right to refuse to bargain matters of inherent managerial policy "... which include, but are not limited to, such areas of discretion or policy as the functions and programs of the public employer, its standards of services, overall

[4] Although these prior decisions involve local school districts and their certificated professional employees, relevant portions of the Public School Employment Relations Act (14 Del.C. sections 4001-4018 (Supp. 1982), upon which they were decided and comparable provisions of the Police Officers' and Firefighters' Employment Relations Act (19 Del.C. sections 1601-1618 (Supp. 1986), which controls the current matter, are identical. Local 1590, IAFF (Supra., p. 8).

budget, utilization of technology, the organizational structure and the staffing levels, selection and direction of personnel". The question clearly becomes whether dental benefits and long term disability insurance are encompassed within "matters concerning or related to" the enumerated terms and conditions of employment or whether they are reserved to employer discretion as matters of inherent managerial policy.

In an early case under the NLRA analyzing the negotiability of health insurance, the First Circuit Court of Appeals held:

... We think it can safely be said that the word 'wages' in section 9(a) of the Act embraces within its meaning direct and immediate economic benefits flowing from the employment relationship. This is as far as we need go, for so construed the word covers a group insurance program for the reason that such program provides a financial cushion in the event of illness or injury arising out of the scope of employment at less cost than such cushion could be obtained through contracts of insurance negotiated individually. W.W. Cross and Co., 1st Cir., 174 F.2d 875 (1949)

The Seventh Circuit Court of Appeals in Inland Steel Co. (170 F.2d 247 (1948)) has similarly upheld the NLRB in finding pension plans to be within matters "... in respect to rates of pay, wages, hours of employment and other conditions of employment". The Court found the promised pension "... to be as much a part of 'wages' as the money paid ... at the time of services. In any event such a plan is one the 'conditions of employment'." Inland Steel (Supra., p. 253).

Although the definition of mandatorily bargainable terms and conditions of employment under the Police Officers' and Firefighters' Employment Relations Act differs somewhat from the language of section 9(a) of the NLRA [5] , we find the logic of the cases cited above to be compelling. The doubling of available dental benefits and the provision of long term disability insurance are clearly direct and immediate economic benefits flowing to individual employees from the employment relationship which constitute emoluments. It cannot be seriously disputed that these benefits constitute a part of consideration for work performed and are a condition of the individual's employment with the City. It is not the "relative significance" of these "peripherals" in comparison to the total benefit packages which determines their negotiability, but rather their economic benefit to employees. As such, we here find them to be mandatory subjects of bargaining as matters concerning or related to wages, salaries, and/or working conditions.

In cases where the parties are currently bound by a valid collective bargaining agreement, contractual language which is clear and unambiguous on its face effectively establishes the status quo. Local 1590, IAFF (Supra., p. 10). The enhanced benefits at issue here are not specifically covered by the respective current bargaining agreements. The duty to bargain, however, continues during the

[5] Section 9 (a) provides:
Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment or other conditions of employment... [29 U.S.C. section 169] (emphasis added)

existence of a bargaining agreement (Smryna Educators Assn. v. Bd. of Education (Del.PERB, U.L.P. No. 87-08-015 (10/26/87))) concerning any mandatory subject of bargaining which has not been specifically covered in the contract and regarding which the union has not clearly and unmistakably waived its right to bargain. Rockwell International Corp. 260 NLRB 153, 109 LRRM 1366 (3/31/82). However, the status quo in this case is constituted by the parties contractual benefit packages as modified by the City and tacitly agreed to by the Unions, through the unilateral enhancements of July, 1988. Accordingly, the City was obligated to bargain any modifications to these peripheral benefits with the Unions.

Finally, the City has argued that it was compelled to withdraw the peripheral benefits from the non-Blue Cross health insurance packages in order to meet Blue Cross/Blue Shield's directive to "level the playing field". The City asserts that it was necessary for it to meet Blue Cross' demand in order to comply with the Executive Director's order in Local 1590, IAFF, (Supra.). While its action represents one alternative available to the City, the clear purposes of the Act is to promote and require collective bargaining as a means of insuring stable and productive relationships. Faced with this dilemma, the City had an obligation to negotiate its proposed recission of the peripheral benefits with the affected unions or explore with them alternative methods for continuing the basic benefits. Similarly, there is no evidence before this Board which supports the City's contention that it's action was economically justified. If a financial emergency existed, it is incumbent upon the City to establish its existence and the need for the immediate specific action which it

undertook.

CONCLUSIONS OF LAW

1. The City of Wilmington is a municipal employer within the meaning of 19 Del.C. section 1602(1) of the Police Officers' and Firefighters Employment Relations Act, 19 Del.C. Chapter 16 (Supp. 1986)

2. The International Association of Firefighters, Local 1590, is an employee organization within the meaning of 19 Del.C. section 1602(g) and is the exclusive representative of the City's firefighters employed in the ranks of firefighter, lieutenant and captain, within the meaning of 19 Del.C. section 1602(h).

3. The Fraternal Order of Police, Lodge No.1, is an employee organization within the meaning of 19 Del.C. section 1602(g) and is the exclusive representative of the City's police officers employed in the ranks of patrol person, sergeant, lieutenant and matrons within the meaning of 19 Del.C. section 1602(h).

4. Local 1590, IAFF and FOP Lodge No. 1 did not waive their prospective right to challenge the removal of peripheral benefits by not objecting at the time such benefits were unilaterally instituted by City in July, 1988.

5. The dental benefits unilaterally instituted by the City are a mandatory subject of bargaining within the meaning of 19 Del.C. section 1602(n).

6. The long term disability benefit unilaterally instituted by the City is a mandatory subject of bargaining within the meaning of 19 Del.C. section 1602(n).

7. By unilaterally withdrawing the non-negotiated dental benefits, the City unilaterally instituted a change in the status quo of a mandatory subject of bargaining without bargaining with and without the consent of the exclusive representatives of affected employees, in violation of 19 Del.C. section 1607(a)(5).

8. By unilaterally withdrawing the non-negotiated long term disability benefits, the City unilaterally instituted a change in the status quo of a mandatory subject of bargaining without bargaining with and without the consent of the exclusive representatives of affected employees, in violation of 19 Del.C. section 1607(a)(5).

9. By the totality of its conduct, the City of Wilmington has interfered with, restrained and coerced its employees in the exercise of rights guaranteed under the Police Officers' and Firefighters Employment Relations Act, in violation of section 1607 (a)(1).

WHEREFORE, THE CITY OF WILMINGTON IS HEREBY ORDERED TO:

A. Cease and desist from its suspension of the \$1,000 dental benefit and the long terms disability insurance that it unilaterally added to the "St. Francis" and "Principal" HMO plans on or about July 1, 1988.

B. Reinstate the dental benefit and long term disability benefit, retroactive to the date of suspension, and make whole all affected employees who were otherwise eligible for such benefits during the period of the suspension.

C. Take the following affirmative action:

1. Issue a written rescission of any and all notices pertaining to the suspension of the dental and

long term disability benefits.

2. Notify all affected employees of the rescission of such suspension and the availability of the benefits retroactive to the date of suspension.
3. Within ten (10) days from the date of receipt of this decision, post a notice of the attached NOTICE OF DETERMINATION in each location within the City where notices of general interest to affected employees are normally posted. The notice shall remain posted for a period of thirty (30) days.
4. Notify the Public Employment Relations Board in writing within thirty (30) calendar days from the date of this Order of the steps taken to comply with this Order.

IT IS SO ORDERED.

D. Murray-Sheppard

DEBORAH L. MURRAY-SHEPPARD

Principal Assistant

Delaware PERB

Charles D. Long, Jr.

CHARLES D. LONG, JR.

Executive Director

Delaware PERB

DATED: January 23, 1990

